that a parol agreement or written contract, where the licensee does not promise or undertake anything more than to pay a royalty on the ore raised from the mine, is a revocable license, and not a lease. See, also, 1 Minor on Real Property, § 51; Taylor's Landlord & Tenant (6th Ed.) § 251.

[2] Tested by these authorities, it would seem clear that the relation of landlord and tenant did not exist between the Goshen Iron Company and Church, and, consequently, the issuance and levy of the distress warrant was without authority of law.

It follows that the order must be reversed, and judgment entered in accordance with the foregoing opinion.

Reversed.

KEMP *v.* MCGUIRE *et al.*

Nov. 16, 1911.

[72 S. E. Rep. 686.]

Wills (§ 603*)—Estates Created—Conditional Fee.—A will provided that testatrix's husband should have the property during his lifetime, and that on his death it should go to a daughter, and that if the daughter should outlive the husband, and die "without a husband or issue," the property should go to certain persons. Held, that the daughter, who survived her father, took a conditional fee, so that, if at her death she had a husband or issue, one or both her estate would become absolute; a contention that she must die without a husband and also without issue to defeat her fee, and that as she had a husband, although he might predecease her, she could not die without a husband, being without merit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351-1359; Dec. Dig. § 603.*]

Appeal from Circuit Court, Rockingham County.

Action by Edward McGuire and others against Lulu V. Kemp. From a decree for plaintiffs, defendant appeals. Affirmed.

Ed C. Martz, for the appellant.

No appearance for the appellees.

KEITH, P. This suit was brought by Edward McGuire and others, judgment creditors of Lula V. Kemp, who before her marriage was Lula V. Miller, to subject certain real estate to the payment of her debts. Lula V. Kemp takes title to the property

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

in question under the will of her mother, Sarah J. Miller, which the circuit court held was an estate in fee, liable to be devested at her death upon certain conditions. From that decree this appeal was allowed.

The will is as follows:

"This is to certify that I, Sarah J. Miller, the wife of Thomas H. Miller, do will and bequeath to my husband, Thomas H. Miller, all of my real estate and personal property to have and to hold during his lifetime, and at his decease said property to go to our daughter, Lula V. Miller.

"(2) Should Lula V. Miller decease before her father's death I bequeath all that may be left after her father's death to my brother Wm. Lambert, my sister Laura V. Dinkle and Eliza Lambert, or in case of their death to their children.

"(3) In case my daughter, Lula V. Miller, should outlive her father and die without a husband or issue, then the property to go as above stated."

Lula V. Miller survived her father, Thomas H. Miller, and therefore the bequest to him conditioned upon his surviving his daughter fails, and Thomas H. Miller disappears from the case. The question to be decided is the effect of the language in the third clause of the will: "In case my daughter, Lula V. Miller, should outlive her father and die without a husband or issue, then the property to go as above stated." She has survived her father and that condition is fulfilled.

The decision of the circuit court was that "Lula V. Kemp has an estate in fee in the house and lot of land mentioned and described in these proceedings, liable, however, to be divested upon her dying without a husband or issue living at the time of her death; and should she so die without a husband or issue surviving, then said house and lot is to vest in fee in the remaindermen named in said will."

The appellant contends that the word "or" should be construed as "and," relying upon Goldsborough *v.* Washington, 70 S. E. 525; that Lula V. Miller must die without a husband and without issue in order to defeat her estate; and that as she has a husband, although he may predecease her, she cannot be said to have died without a husband, relying upon the decision of this court in Jennings *v.* Commonwealth, 109 Va. 821, 63 S. E. 1080, 21 L. R. A. (N. S.) 265, 132 Am. St. Rep. 946, where it was held that a woman who has been married and divorced is not an "unmarried female," within the intendment of section 3677 of the Code, providing punishment for the seduction of any unmarried female of previous chaste character. But that case we do not think by any means conclusive of this. While in a criminal prosecution the court was justified, under the authorities, in

holding that the terms of a penal statute were not to be extended, and that the phrase "unmarried female," as used in the statute, had reference to one who had never been married, the language of this will is although different. A woman who has married and whose husband has died is without doubt a woman "without a husband;" but she may die without a husband and still have issue of her marriage living at her death, and it cannot be supposed that the testatrix intended to defeat the estate of her daughter because she died without a husband, though issue of the marriage were living.

We think, therefore, that the phrase should be construed as though the testatrix had said, "die without a husband and issue," thus requiring the absence of both conditions to defeat the estate of her daughter. Lula V. Miller may die without a husband and without living issue, in which event the property would go under the will "as above stated"—that is to say, to the brother and sisters of the testatrix; or she may die leaving a husband and issue, in which case all the conditions of her title are fulfilled and she takes a fee simple; or she may die leaving issue, in which case she would also take a fee simple; or she may die leaving a husband, without issue, and in that case, also, she would take a fee simple.

It will be observed that in the first clause of the will the husband of the testatrix and father of Lula V. Miller is given a life estate, and if he survived his daughter his life estate, of course, under the first clause of the will, would still continue, and only that which was left after his death would pass to the brother and sisters of the testatrix, and it might well be urged, under those conditions, that he took a fee simple; but, as he predeceased his daughter, that inquiry need not be pressed. The objects of the bounty of the testatrix were her husband, to whom she gave a life estate, her daughter, who took a conditional fee if she survived her father, with a conditional remainder to the brother and sisters of the testatrix. Now by the terms of the third clause of the will exactly the same situation may arise as to the estate given the daughter which confronted the testatrix when she came to make a will. If the daughter has a husband living at the time of her death, or issue living at the time of her death, she takes a fee simple, which upon her death without a will would pass to her heirs, or if she saw fit, and her husband survived her, he might become the beneficiary of her will, just as the father and husband might have taken in the will under consideration.

We are therefore of opinion that the appellant took an estate in fee under her mother's will, liable to be devested upon her dying without a husband or issue living; in other words, it re-

quires the absence or failure of presence of both conditions, a husband and issue, to defeat the estate, and if at the time of her death she has a living husband or issue, one or both, her estate becomes an absolute fee simple.

The decree of the circuit court must be affirmed.

RUNKLE'S ADM'R v. RUNKLE'S ADM'R et al.

Nov. 16, 1911.

[72 S. E. 695.]

1. **Interpleader (§ 37*)—Grounds of Relief—Statutory Provisions.**—Code, 1904, § 2998, providing for a summary proceeding by interpleader in a pending action, does not enlarge the rule governing bills of interpleader, but merely furnishes a special cumulative and concurrent remedy without limiting or affecting the equitable jurisdiction by bill of interpleader.

[Ed. Note.—For other cases, see Interpleader, Dec. Dig. § 37.*]

2. **Interpleader (§ 6*)—Right to Maintain Bill of Interpleader.**—A bank coming into possession of money as debtor to or bailee of the estate of a deceased wife may not maintain a bill of interpleader against her administrator and against the administrator of the deceased husband, both claiming the money, because of its independent liability as debtor or bailee, and because of want of privity between the two claimants under the rule that the equitable remedy of interpleader independent of statute is dependent on the existence of four elements: The same debt or duty must be claimed by all the parties against whom the relief is demanded; all their adverse claims must be dependent on or derived from a common source; the person asking the relief must not have any interest in the subject-matter; and he must not have incurred an independent liability to either of the claimants.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 6; Dec. Dig. § 6.*]

Appeal from Circuit Court, Rockingham County.

Bill of interpleader by the Bank of Elkton against Rebecca M. Runkle's administrator and against William J. Runkle's administrator to determine rights to a fund in possession of the bank. From a decree adjudging that William J. Runkle's administrator is entitled to the fund, Rebecca M. Runkle's administrator appeals. Reversed and rendered, dismissing the bill for want of jurisdiction.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.